1992

Cox v. Cox : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

JANET R. (COX) REX,

Plaintiff/Appellant,

-vs-

K. NORMAN COX,

Defendant/Appellee.

Case No. 92-0818

Trial Court No. 904402060

Priority Classification 15

BRIEF OF APPELLANT

AN APPEAL FROM THE JUDGMENT AND DECREE OF DIVORCE ENTERED BY THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY, STATE OF UTAH, ON OR ABOUT OCTOBER 28, 1992, THE HONORABLE LYNN W. DAVIS PRESIDING.

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IN THE UTAH COURT OF APPEALS

JANET R. COX,

Plaintiff/Appellant,

-vs- Case No. 92-0818

K. NORMAN COX, Trial Court No. 904402060

Defendant/Appellee. Priority Classification 15

BRIEF OF APPELLANT

COMES NOW THE PLAINTIFF/APPELLANT (hereinafter "plaintiff" or "wife") and submits the following as her Brief of Appellant in the above-captioned case:

JURISDICTIONAL AUTHORITY

Jurisdiction to review the final order and judgment herein, which is a Decree of Divorce, is vested in the Utah Court of Appeals pursuant to the Rules of the Utah Court of Appeals, Rules 3 and 4, and Utah Code Annotated, §78-2a-3(2)(i).

NATURE OF THE PROCEEDINGS

The matter below is a divorce proceeding, and the order appealed from is a Decree of Divorce.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Did the trial court err in making its property distribution in this case? Specifically:

   a. Did the trial court err in awarding the defendant/husband all his premarital assets, together with the vast majority of the marital assets of the parties?

   b. Did the trial court err in refusing to compensate the plaintiff for the fact that she had co-mingled and expended her premarital assets during the parties' marriage?

   c. Did the trial court err in failing to compensate plaintiff for an interest in the real property?

   d. Did the trial court err in ordering plaintiff to pay defendant's attorney's fees?

2. Did the trial court err in failing to award either rehabilitative or permanent alimony to the plaintiff?

3. Did the trial court err in the manner in which it interpreted the prenuptial contract entered between the parties?

DETERMINATIVE PROVISIONS, CASES, STATUTES AND RULES

There is no case law authority nor statutory authority believed by the defendant to be wholly dispositive of the issues raised on appeal.

STANDARD OF REVIEW

The standard of review on appeal is an abuse of discretion standard as to all issues. The trial court should have broad discretion in domestic relations matters, and so long as that discretion is exercised within the confines of the proper legal standards set by the appellate courts of this state, and so long as the facts and reasons for the decision are set forth fully in appropriate findings of fact and conclusions of law, this court should not disturb the resulting order.

This court should review the factual findings of the trial judge under the "clearly erroneous" standard. A finding is "clearly erroneous" when "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." State v. Walker, 743 P.2d 191, 193 (Ut. 1987).

STATEMENT OF THE CASE

This appeal is from the final judgment and decree of divorce entered in the Fourth Judicial District Court in and for Utah County, State of Utah, the Honorable Lynn W. Davis, District Court Judge presiding, which, among other things, entered an order regarding property distribution, alimony, attorney's fees, and interpreting a prenuptial contract of the parties.

Wife filed for divorce in the trial court. Responsive pleadings were filed by defendant/appellee (also hereinafter "husband") and the matter came on before the lower court, sitting without a jury, for trial, on August 31, 1992. The trial court took the matter under advisement, and issued a memorandum decision, which was entered September 28, 1992. The memorandum decision is attached hereto as appendix "C."

Findings of fact, conclusions of law and The decree of divorce from which the plaintiff/appellant pursued this appeal were entered on October 28, 1992. A true and correct copy of the findings is attached as appendix "A." The decree is attached as appendix "B." A notice of appeal was filed on behalf of the defendant on November 27, 1992.

A copy is attached as appendix "D." There have been no motions filed pursuant to Rule 50(a) or 50(b), 52(b), 54(b), or 59, of the Utah Rules of Civil Procedure.

STATEMENT OF THE FACTS

The parties to the above-captioned matter were previously husband and wife. They were married on July 1, 1988. They were divorced by a decree of divorce entered on October 28, 1992. The trial as to all issues was held on August 31, 1992.

The parties do not have any children born as issue of their marriage. This marriage was the plaintiff's third marriage and the

defendant's second. At the time of their marriage, plaintiff was forty-seven years old and the defendant was fifty-six years old. (Findings of Fact 4, R.O.A. 214). Prior to the date of marriage, the parties executed a prenuptial contract. That prenuptial contract was admitted as exhibit 3 at the time of trial. A true and correct copy of this exhibit is attached hereto and incorporated herein as appendix "E." Page 4 of exhibit 3 recites that the value of the husband's estate, as of June 28, 1988, was approximately $380,000.00. The contract also recites that the wife's estate, as of June 28, 1988, was valued at $70,000.00. There is no itemization of the parties' assets in exhibit 3.

In 1966, husband built a house at 773 South 400 East in Orem, Utah. He paid a mortgage on the property in full. At the time of the parties' marriage in 1988, the property was unencumbered. (Findings of Fact 5, R.O.A. 214).

Prior to the parties' marriage, the wife also owned a residence. She sold her separate residence prior to the parties' marriage, and received $21,000.00 as proceeds from that sale. From that $21,000.00, the wife repaid her parents $18,000.00 she had borrowed from them to purchase her residence in the first place. (Findings of Fact 6, R.O.A. 213).

Contemporaneous with the execution of the parties' antenuptial agreement, the husband executed a warranty deed granting the wife

a joint interest in his premarital home. (Findings of Fact 9, R.O.A. 211, 212). A true and correct copy of the warranty deed in issue was admitted at trial as exhibit 4. A copy is attached hereto as appendix "F." This warranty deed was dated June 29, 1988, one day before the husband executed the antenuptial agreement on June 30, 1988.

The value of the husband's home prior to this marriage and prior to remodeling was $77,000.00. The wife expended $18,062.65 for remodeling of the husband's premarital home. Of this sum, $9,005.55 was expended by plaintiff prior to the execution of the antenuptial agreement. The plaintiff received "reimbursement" from the defendant during the marriage of $5,500.00 for a part of this sum. Therefore, plaintiff expended a net sum of $12,562.65 for remodeling the husband's premarital home. The defendant spent $11,931.00 for remodeling the home. (Findings of Fact 12, R.O.A. 210, 211). The trial court has failed to find whether the defendant expended his money on the remodeling of his premarital home before or after the execution of the premarital contract, and/or before or after the parties' marriage. The trial court also failed to make a finding about the source of finds for this expenditure.

The court found that the fair market value of defendant's premarital home at the time of the parties' separation was

$105,000.00. (Findings of Fact 13, R.O.A. 212). The court did not value the home as of the date of divorce.

The trial court found (and plaintiff disputes the finding) that defendant's premarital home did not increase in value as a result of plaintiff's remodeling expenditures. The lower court found that the value of defendant's premarital home in 1988, plus the amount of the money the parties had paid jointly toward the remodeling, totalled $106,993.65, exceeding the $105,000.00 fair market value by $1,993.65. (Findings of Fact 13, R.O.A. 211).

The trial court found that both parties liquidated their separate assets and "invested them in the marriage." (Apparently this means that assets were expended during the marriage.) (Findings of Fact 14, R.O.A. 211). The trial court specifically found that plaintiff had expended $74,000.00 during the marriage, $30,000.00 of that sum to her children. The court found that the defendant had expended $109,114.45 during the marriage. In other words, plaintiff expended all of her premarital assets, and a few thousand dollars more, during the course of the parties' marriage. The defendant expended less than one-third of his premarital assets during the parties' marriage.

The court found the plaintiff's gross monthly income to be $1,850.00, and her "net worth" to be $10,539.00. (Findings of Fact 15 and 19, R.O.A. 209, 210). The court found the defendant's net

worth at the time of separation to be $232,249.00, and his gross monthly income to be $554.00 per month. (Findings of Fact 15 and 19, R.O.A. 209, 210).

The trial court awarded husband all right, title and interest in the home in Orem, Utah. (Decree of Divorce, paragraph 7, R.O.A. 217). Plaintiff was awarded her pre-marriage and post-marriage remodeling expenditures, in the sum of $12,562.65. (Decree of Divorce, paragraph 5, R.O.A. 218). Plaintiff was not granted a lien interest in the residence, nor a judgment against the defendant for this sum.

The wife was ordered to pay some of defendant's attorney's fees, totalling $4,649.00. (Decree of Divorce, paragraph 10, R.O.A. 217).

The plaintiff was not awarded any alimony from the defendant. (Decree of Divorce, paragraph 9, R.O.A. 217).

From this final judgment and order of the court, the plaintiff filed a timely appeal. (R.O.A. 231).

SUMMARY OF THE ARGUMENT

The trial court's finding that the husband's income was in the total sum of $554.00 per month was a clearly erroneous finding. The evidence at trial supports a conclusion that the defendant's income far exceeded this amount.

Based upon the incomes of the parties, the disparity in their assets, and the disparity in their circumstances the court erred in failing to award the plaintiff alimony.

The trial court erred in failing to find that the plaintiff had an interest in the Orem residence, and in failing to award her one-half the total value of that residence.

The trial court erred in awarding the defendant attorney's fees, based upon the disparity in the parties' assets, and the reasonableness of the plaintiff's claims made at trial.

ARGUMENT

POINT I: THE TRIAL COURT ERRED IN FAILING TO AWARD PLAINTIFF ALIMONY.

A. The parties' incomes and circumstances were not properly considered by the court.

As noted above, this Court should review the factual findings of the trial judge under a "clearly erroneous" standard. This Court should find the trial court's factual determinations to be "clearly erroneous" where, although there is some evidence to support the trial court's conclusions, the reviewing court "on the entire evidence is left the definite and firm conviction that a mistake has been committed." State v. Walker, supra.

Plaintiff is mindful of her obligation to this court to martial the evidence regarding the parties' respective circumstances, and to demonstrate, once the evidence has been marshalled, that it fails to pass the "clearly erroneous" standard.

All of the evidence presented at trial regarding the parties' respective incomes came from the parties themselves. The wife testified that she was employed during the marriage as a secretary in the management-communication department at Brigham Young University. (Tr. p.30, ll.3-7). Her income at the time of the marriage was $1,008.58, net per month. (Tr. p.30, ll.8-12).

In addition, during the marriage, the plaintiff received social security for her son from a previous marriage. She received a total of $6,400.00 from this source during the marriage. Of this, approximately half was paid directly to her son, and half was spent on marital expenses for these parties. (Tr. p.31, ll.2-24).

At the commencement of the marriage, the plaintiff had some investment income, but the investments were liquidated during the marriage. She also received a lump sum of approximately $32,000.00 from the liquidation of a contract on Oregon real property, which was disbursed, with agreement from the defendant, partly to plaintiff's children, and partly for marital obligations of this marriage. (Tr. p.32, l.223). As of the date of trial, the wife had only her monthly income. She had no other source of income,

either from investment or contract receivables, such as she had enjoyed at the date of marriage. (Tr. p.46, ll.2-11).

As of the time of trial, the wife was earning inadequate income to meet her monthly living expenses. She was receiving monthly assistance from her church to pay the mortgage for her new residence, and was receiving food assistance from her church. (Tr. p.43, l.13 through p.44, l.5; p.46, l.22 through p.47, l.4).

Plaintiff requested assistance from the defendant, in the form of alimony at the rate of $250.00 per month, for a period of three years, in order to pursue an education to improve her income. (Tr. p.55, ll.2-10).

The defendant testified that his monthly earnings in 1990, were in the sum of $1,400.00 per month. (Tr. p.159, ll.2-7). Prior to and during the parties' marriage, defendant owned a business, Ward's Body Shop. (Tr. p.158, ll.21-24).

As of trial, defendant received $558.00 per month in unemployment benefits. He testified he was seeking employment, but had not been "called" on any job applications. (Tr. p.159, ll.8-21).

Defendant testified that he has "bad knees," which prevented him from performing auto body work at Ward's Body Shop. (Tr. p.169, ll.15-p.170, l.5). Other than this testimony, no other evidence was adduced regarding defendant's "disability." Defendant

produced no medical report, nor the testimony of any health care provider, regarding his ability to obtain employment.

The law in the state of Utah requires that a person be actively seeking employment and able to accept employment, in order to receive unemployment compensation. It should be assumed by this Court that, if the defendant qualified to receive unemployment compensation, he was capable of employment. His historical income, by his own testimony, was $1,400.00 per month. (The defendant did not testify, and the court did not make a finding, whether this was net or gross income.)

Based upon all of this evidence, and upon a lack of evidence as to the defendant's "medical disability," the lower court's finding that defendant's income was $558.00 per month, is clearly erroneous.

B. The trial court should have assessed the defendant for alimony under the circumstances of this case.

As noted in the previous point of argument, the trial court should have attributed income to the defendant in excess of the amount of his monthly unemployment compensation. The court should have found that the parties' incomes were approximately equal. Further, the court should have found that other circumstances of the parties, beyond a mere consideration of income, warranted an

order for alimony.

The trial court, in making a determination regarding an award of alimony, must consider the potential obligor's ability to pay alimony, the potential obligee's ability to provide support for herself, and the needs of the potential obligee. Jones v. Jones, 700 P.2d, 1072 (Ut. 1985).

The trial court found the third prong of this test to be satisfied, in that the court found the defendant did not and could not earn adequate income to support herself. (See the memorandum decision, R.O.A. 202).

The second prong of the Jones test is satisfied. Clearly, if the obligee had a need for alimony, and she was already employed full-time, then she did not have an ability to support herself.

The only remaining factor for consideration is the ability of the obligor to provide support. In this case, the trial court limited its consideration as to this factor to the issue of defendant's current income, and defendant's unsubstantiated "disability." The court below fails to consider the other components making up the defendant's financial circumstances. In making its determination regarding alimony, the trial court fails to consider that the defendant had a home valued at $105,000.00, virtually free of encumbrance. On the other hand, the plaintiff would not have had a home but for her parents' willingness to buy

a home and permit her to occupy the home, and the willingness of her church to pay the mortgage on that residence.

The trial court failed to consider that the defendant enjoyed a total net worth in excess of $230,000.00, while the plaintiff's net worth was slightly more than $10,000.00, and comprised entirely of a retirement plan which she could not access without substantial penalty.

The defendant might argue that such an order of alimony would have the effect of requiring the defendant to pay alimony out of his premarital property. This would not be an appropriate consideration for this Court to make. This Court has previously held in Sampinos v. Sampinos, 750 P.2d, 616 (Ut. App. 1988), that an award of alimony may be entered which necessitates that alimony be paid out of premarital property. In the Sampinos case, this Court of Appeals approved an alimony award which required that the alimony be paid out of coal contract proceeds which were determined to be the obligor's sole and separate property.

Under all of the circumstances here, it was error for the trial court to fail to award alimony to the plaintiff. The matter should be remanded to the trial court for imposition of an award of alimony, and findings of fact as to the appropriateness of permanent versus rehabilitative alimony.

POINT II. THE TRIAL COURT ERRED IN FAILING TO AWARD THE PLAINTIFF ONE-HALF THE OREM RESIDENCE.

Plaintiff concedes that defendant owned the Orem residence in issue for a substantial period of time prior to the parties' marriage. Ordinarily, pursuant to the laws of the state of Utah, the defendant would be entitled to receive the home as his premarital property, free and clear of any interest of the plaintiff.

However, in the instant case, the circumstances which occurred immediately before and during the marriage of the parties are such that the plaintiff acquired a legal interest in an equitable interest in the Orem residence. This property interest should have been divided equally between the parties, as of the date of the divorce.

Approximately two days before the parties' marriage, and one day before he executed the antenuptial contract, the defendant conveyed the property in question to the parties, jointly, as joint tenants, by means of a warranty deed. Plaintiff expended over $9,000.00 in the remodeling of the home, in the months immediately prior to the marriage, and over $9,000.00 in remodeling the home after the marriage. It is irrelevant that the defendant "reimbursed" the plaintiff $5,500.00 during their marriage. A

financial conveyance of this sort between husband and wife during a marriage does not and should not alter the nature and extent of the marital estate.

The defendant also contributed a substantial sum of money to the remodeling of the residence. The trial court found that he had paid $11,931.00 for the remodeling. It is a reasonable inference that he paid this sum out of income earned during the marriage, since defendant was employed during the marriage. The court makes no finding to the contrary. If defendant paid these funds out of earned income, then these funds are also a marital asset.

The parties lived together in the home as husband and wife. The home appreciated in value from its 1988 fair market value of $77,000.00 to its value of $105,000.00 on the date of separation.

The trial court has made a finding that the increase in the value of the Orem residence was not a result of the plaintiff's remodeling expenditures. This finding is plain error. An application of simple arithmetic to the problem indicates that the 1988, $77,000.00 value, added to the plaintiff's total remodeling expenditures of $18,062.65, and the defendant's total remodeling expenditures of $11,931.00, totals $106,993.65, or only about $2,000.00 more than the fair market value at the date of separation. There was no evidence from any real estate appraiser, or any other expert, to show any cause for increase in the value of

the home between 1988 and 1992, other than the remodeling paid for jointly by the parties.

Under these circumstances, it was error for the trial court simply to reimburse plaintiff for her repair costs, without interest, and without even any security for these costs awarded, and to award the home to the defendant. The court's of this state have recognized that, though the general rule is that premarital property may be viewed as the separate property of a party, this is not binding in all circumstances. In Naranjo v. Naranjo, 751 P.2d, 1144 (Ut. App. 1988), the court found that "premarital property" may be subject to distribution in a divorce case. The Naranjo court stated:

> . . . A party may be awarded property which the other spouse brought into the marriage. In fashioning an equitable property division, trial courts must consider all of the pertinent circumstances, including the amount and kind of the property to be divided, the source of the property, the parties' health, the parties' standard of living and respective financial conditions, their needs and earning capacities, the duration of the marriage, what the parties gave up by the marriage and the relationship the property division has with the amount of alimony awarded.

In this case, the premarital property was commingled by virtue of the warranty deed. Moreover, the plaintiff made substantial contributions toward improving the value of the residence, both by paying for the expenses of remodeling, and by enduring the

inconvenience of remodeling while it was in progress. Because of all these circumstances, she acquired a full title interest in the home, and should have received half the value thereof at trial.

The defendant may argue that the antenuptial agreement of the parties mandated that the house be awarded to the defendant as his sole and separate property. This is not the case. To the extent that the trial court relied upon the antenuptial contract as the basis to award the home to the defendant, the trial court erred in interpreting the contract.

The plaintiff concedes that antenuptial contracts are generally recognized and enforceable in the state of Utah.

> . . .In general, pre-nuptial agreements concerning the disposition of property owned by the parties at the time of their marriage are valid so long as their is no fraud, coercion, or material non-disclosure. Hack v. Hack, 734 P.2d, 417 (Ut. 1986).

The problem for the defendant with the antenuptial contract in the case now before the court is the ambiguity contained in the contract with regard to the defendant's assets. The contract purports to provide full disclosure of each party's assets by listing a total net worth of each party. The contract fails to identify with particularity, however, exactly what assets go into making up that net worth. There is no specific list of assets included in or appended to the antenuptial contract. Therefore, it is impossible to determine whether the defendant disclosed the

value of his assets by including or excluding the value of the Orem home.

The defendant, in apparent contradiction to the antenuptial contract, executed a warranty deed on the day before he executed the contract. The warranty deed vested the plaintiff with an undivided one-half interest in the Orem home, as a joint tenant with defendant. After granting the plaintiff this title interest in the property, the defendant then signed a contract disclosing his net worth, without specifying his assets, and agreeing with the plaintiff that his premarital assets would be awarded to him.

It is clear from this conduct that the defendant intended to award the plaintiff a title interest in the Orem residence. He apparently intended to protect other premarital assets (including his interest in a cabin in the Ward's Body Shop business) from the plaintiff in the event of a divorce. He repented of his decision to give the plaintiff the Orem home only after it became apparent that the parties' marriage would not last.

Under all of the circumstances, the court below erred in failing to award plaintiff her one-half interest in the home. Further, the home should have been valued as of the date of the decree, not as of the date of separation. Berger v. Berger, 713 P.2d, 695 (Ut. 1985). The matter should be remanded to enter judgment awarding plaintiff a one-half interest in the orem home as

of October 29, 1992.

POINT III. THE TRIAL COURT ERRED IN ORDERING THE PLAINTIFF TO PAY DEFENDANT'S ATTORNEY'S FEES.

The trial court ordered that the plaintiff would pay the defendant's attorney's fees in the sum of $4,649.00. It is clear from the record that the determination to award the defendant this sum in attorney's fees was based upon the plaintiff's failure to accept the defendant's offer of judgment. (The offer appears at R.O.A., 121). The trial court's determination was not more favorable to the plaintiff than the defendant's pretrial offer of judgment. (Findings of Fact 21, R.O.A., 209). There is no other basis for the trial court's award of attorney's fees to the defendant than the plaintiff's failure to accept the offer of judgment.

The trial court's ruling misinterprets Rule 68 of the Utah Rules of Civil Procedure. Rule 68(b) reads, in pertinent part as follows:

> . . . If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. . . .

Rule 68 makes reference to "costs" and not to attorney's fees.

The costs provided for in this Rule are limited to taxable costs only, and do not include attorney's fees. Nelson v. Newman, 583 P.2d, 601 (Ut. 1978). Therefore, the trial court committed error in assessing attorney's fees solely upon the basis of Rule 68.

The trial court had wide latitude, pursuant to its equitable powers in this divorce proceeding, to award attorney's fees and to assess costs of trial, including costs which would otherwise be non-taxable costs. Hardy v. Hardy, 776 P.2d 917 (Ut. App. 1989). However, a trial court has an obligation to make adequate factual findings to support this conclusion. Failure to make adequate findings on all material issues is reversible error in and of itself. Jeffries v. Jeffries, 80 U.A.R., 18 (Ut. App. 1988).

There is absolutely no factual finding of the trial court, other than the erroneous legal conclusion regarding the offer of judgment, to support the order that plaintiff pay attorney's fees to defendant.

This matter should be remanded to the trial court for a factual determination regarding equitable issues surrounding the attorney's fees award.

CONCLUSION

For the foregoing reasons, the ruling of the trial court in this matter should be reversed and remanded for entry of an order awarding the plaintiff alimony, for entry of an order awarding the plaintiff one-half interest in the Orem residence, and for entry of specific findings regarding an appropriate attorney's fees award in this case.

Plaintiff should be awarded her attorney's fees incurred in pursuing this appeal.

RESPECTFULLY SUBMITTED THIS _____ day of June, 1993.

CORPORON & WILLIAMS

_____

MARY C. CORPORON
Attorney for Defendant/Appellant

CONCLUSION

For the foregoing reasons, the ruling of the trial court in this matter should be reversed and remanded for entry of an order awarding the plaintiff alimony, for entry of an order awarding the plaintiff one-half interest in the Orem residence, and for entry of specific findings regarding an appropriate attorney's fees award in this case.

Plaintiff should be awarded her attorney's fees incurred in pursuing this appeal.

RESPECTFULLY SUBMITTED THIS 14 day of June, 1993.

CORPORON & WILLIAMS

MARY C. CORPORON
Attorney for Defendant/Appellant

CERTIFICATE OF HAND-DELIVERY

I HEREBY CERTIFY that I am employed in the offices of Corporon & Williams, attorneys for the plaintiff/appellant herein, and that I caused the foregoing BRIEF, to be served upon defendant/appellee by hand-delivering two true and correct copies of the same in an envelope addressed to:

BYRON FISHER
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on the 14 day of June, 1993.

CERTIFICATE OF HAND-DELIVERY

I HEREBY CERTIFY that I am employed in the offices of Corporon & Williams, attorneys for the plaintiff/appellant herein, and that I caused the foregoing BRIEF, to be served upon defendant/appellee by hand-delivering two true and correct copies of the same in an envelope addressed to:

BYRON FISHER
Attorney for Plaintiff/Appellee
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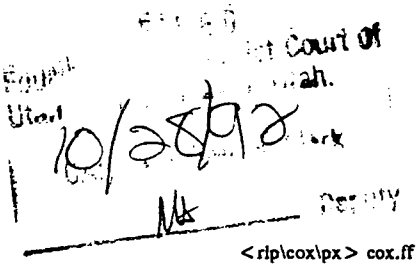
on the _____ day of _____, 1993.

_____

APPENDIX "A"
Findings of Fact and Conclusions of Law



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IN THE FOURTH JUDICIAL DISTRICT COURT FOR UTAH COUNTY

STATE OF UTAH

JANET R. COX, Plaintiff, vs. K. NORMAN COX, Defendant.	**FINDINGS OF FACT AND CONCLUSIONS OF LAW** **Civil No. 904402060**

This matter came before the Court for trial on August 31, 1992. Plaintiff appeared in person and by counsel, Gary H. Weight, Esq. Defendant appeared in person and by counsel, Marilyn Moody Brown, Esq. and Richard L. Peel, Esq. The parties presented a Stipulation to the Court. The Court proceeded to hear the matter on its merits and now enters the following:

. . .

FINDINGS OF FACT

1. The Court finds that Plaintiff meets the residency requirements of the divorce statutes of the State of Utah.

2. The Court finds that the parties have experienced irreconcilable differences, such that Plaintiff should be awarded a decree of divorce.

3. The Court finds that Plaintiff and Defendant were married for fewer than three years. From the day they were married, July 1, 1988, to the date of their final separation, December 1, 1990, the parties were only married for twenty-nine months. Of the twenty-nine month marriage, the parties experienced a brief trial separation of five months.

4. The Court finds that at the time of their marriage, Plaintiff was 47 years old and Defendant was 56 years old. This was Plaintiff's third marriage and Defendant's second. No children were born into the marriage.

5. The Court finds that in 1966, Defendant built a house at 773 South 400 East, Orem, Utah, 84058. Defendant raised nine children in this house and paid off a twenty year VA mortgage sometime in 1987. At the time of the parties' marriage, July 1, 1988, the property was unencumbered by mortgage or lien.

6. The Court finds that prior to the parties' marriage, Plaintiff sold her separate residence against the advise of Defendant, and her brother-in-law, an accountant. From the $21,000 proceeds of the that sale, Plaintiff repaid her parents the $18,000 she had borrowed from them to purchase the home.

7. The Court finds that prior to the marriage, Plaintiff had a net worth of $74,000. Plaintiff's $74,000 net worth included the $18,000 she repaid to her parents. The Court finds that Defendant had a net worth of $368,000.

8. The Court finds that prior to the marriage, the parties executed an Antenuptial Agreement. Plaintiff executed the Antenuptial Agreement on June 28, 1988 and Defendant executed the Antenuptial Agreement on June 30, 1988. Defendant intended for his premarital assets, including his personal home, to be protected under the provisions of the Antenuptial Agreement, and Plaintiff had knowledge of Defendant's intent to protect his personal home. Under the provisions of the Antenuptial Agreement, the parties contractually retained the right to dispose of their separate property by commingling such assets or otherwise.

9. The Court finds that nearly contemporaneous with the parties' signing of the Antenuptial Agreement, Defendant executed

a Warranty Deed granting Plaintiff a joint interest in his premarital home.

10. The Court finds that Plaintiff's attorney in 1988, Doug Nielsen, advised and counseled the parties regarding the execution of the Antenuptial Agreement and Warranty Deed. Mr. Nielsen drafted the Antenuptial Agreement and Warranty Deed. Defendant's attorney, Phil Ivie, was not present at any of the meetings held between the parties and Mr. Nielsen. Mr. Nielsen did not send the Warranty Deed to Mr. Ivie, for his review, nor did Mr. Nielsen speak with Mr. Ivie at any time regarding the Warranty Deed.

11. The Court finds that the provisions of the Warranty Deed are patently incompatible with the protection provision of the Antenuptial Agreement. The Antenuptial Agreement was clearly intended by the parties to protect their separate property. That is precisely why they sought the services of an attorney. Clearly, the Warranty Deed was an afterthought by the parties.

12. The Court finds the value of Defendant's home prior to marriage and prior to the remodeling was $77,000.00. The Court finds that Plaintiff expended $18,062.65 for remodeling of Defendant's premarital home (of this amount $9,005.55 was spent by Plaintiff prior to the marriage and prior to the execution of

the Antenuptial Agreement). The Court finds that Plaintiff received $5,500 from Defendant as reimbursement of the amounts expended by her. The Court finds that Plaintiff expended $12,562.65 and that Defendant spent $11,931.00 on the remodeling.

13. The Court finds that the fair market value of Defendant's premarital home at the time of the parties' separation was $105,000.00. Defendant's premarital home did not increase in value as a result of Plaintiff's remodeling expenditures. The value of Defendant's premarital home in 1988 plus the amount of monies the parties paid toward the remodeling or $106,993.65, exceeds the $105,000 fair market value of the home.

14. The Court finds that both parties liquidated separate assets and invested them in the marriage. The Court finds Plaintiff expended $74,000.00 during marriage, of which Plaintiff paid in excess of $30,000 to her children. The Court finds Defendant expended $109,114.45 during the marriage.

15. The Court finds that Plaintiff's net worth at the time of separation was $10,539.00 and Defendant's net worth at the time of separation was $232,249. Plaintiff's net decrease was $63,461 and Defendant's net decrease was $135,709.

16. The Court finds that the parties should be awarded the personal property as it has been divided between the parties. The Court finds that Defendant should pay the remaining debt owed to Zion's First National Bank, which was incurred in February, 1989; the proceeds of which were used for the acquisition of personal property.

17. The Court finds that expenditures made by either party prior to the marriage, July 1, 1988 (but for the remodeling costs), or after the separation date, December 1, 1990, are not claimed, at issue, or reimbursable.

18. The Court finds that Defendant paid to Plaintiff $10,725.00 during the marital period. This amount includes the $5,500 amount Defendant paid to Plaintiff to reimburse her for her remodeling costs.

19. The Court finds that Plaintiff's current gross monthly income is $1,850.00 and Defendant's current gross monthly income from unemployment compensation is $554.00 per month. Defendant's historical income is irrelevant because of his sale of his business and because his physical disability precludes him from seeking full-time employment in his area of training; autobody repair.

20. The Court finds that neither Plaintiff nor Defendant are able to meet their respective financial obligations. Both parties suffered significant financial reversals during the very short marriage and Defendant's ability to pay alimony is clearly lacking.

21. The Court finds that Defendant proffered a $24,000 Offer of Judgment to Plaintiff on or about August 12, 1992, which Plaintiff declined to accept. Subsequent to August 12, 1992, Defendant incurred $4,649 in attorneys fees and costs.

22. The Court finds that Defendant should be awarded all right, title and interest in all real property he brought into the marriage, including his premarital home and other personal properties not otherwise awarded to Plaintiff.

23. The Court finds that Plaintiff should be awarded all rights, title and interest she has in and to her retirement.

From the foregoing Findings of Fact, the Court now enters the following:

CONCLUSIONS OF LAW

1. Plaintiff should be awarded a decree of divorce from and against Defendant, the same to become final and absolute upon signing by the Court and entry by the Clerk in the Registry of Actions.

2. Plaintiff should be awarded the personal property she presently has in her possession. Defendant should be awarded the personal property he presently has in his possession.

3. Defendant should be ordered to pay the debt owing to Zion's First National Bank, which was incurred in February of 1989. Each party should be ordered to pay all debts he or she incurred prior to their marriage, July 1, 1988 (but for the remodeling costs) or after the separation date of 12/1/90 (but for Defendant's attorneys fees and costs incurred subsequent to 8/12/92).

4. Defendant should be ordered to reimburse Plaintiff for her pre-marriage and post marriage expenditures for remodeling Defendant's premarital home, located at 773 South 400 East, Orem, Utah, in the stipulated amount of $12,562.65.

5. Defendant should be awarded legal title and possession of all real property he brought into the marriage, including his personal home located at 773 South 400 East, Orem, Utah and all personal property not otherwise awarded to Plaintiff.

6. Plaintiff should be ordered to immediately reconvey to Defendant by quit claim deed, title to Defendant's premarital home located at 773 South 400 East, Orem, Utah.

7. Plaintiff should be awarded all rights, title and interest she has in her retirement and savings.

8. Plaintiff is not entitled to alimony.

9. Plaintiff should be ordered to pay Defendant's attorneys fees and costs incurred subsequent to August 12, 1992 in the amount of $4,649; $2,360 for the legal services of Richard L. Peel, Esq., and $2,289 for legal services rendered by Marilyn Moody Brown, Esq.

10. Plaintiff is entitled to restoration of her maiden name.

Let a decree be entered accordingly.

DATED this 28 day of October, 1992.

BY THE COURT:

LYNN W. DAVIS
District Court Judge

APPROVED AS TO FORM:

GARY WEIGHT

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MAILING CERTIFICATE

I hereby certify that I mailed, postage prepaid, a copy of the foregoing Findings of Fact and Conclusions of Law to Gary Weight, Esq., attorney for Plaintiff, at Aldridge, Nelson, Weight & Esplin, Post Office Box L, Provo, Utah 84603 this _____ day of October, 1992.

_____

APPENDIX "B"
Decree of Divorce

<rlp\cox\px> cox.dd 10/09/92

MARILYN MOODY BROWN, ESQ. #4803
ROBINSON, SEILER, GLAZIER & BROWN
80 North 100 East
P.O. Box 1266
Provo, UT 84603-1266
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Nevada State Bar #4359
228 S. Fourth Street
Las Vegas, NV 89101
Telephone: (702) 382-0711

Attorneys for Defendant K. NORMAN COX

IN THE FOURTH JUDICIAL DISTRICT COURT FOR UTAH COUNTY

STATE OF UTAH

JANET R. COX, Plaintiff, vs. K. NORMAN COX, Defendant.	**DECREE OF DIVORCE** **Civil No. 904402060**

This matter came before the Court for trial on August 31, 1992. The Plaintiff appeared in person and by counsel, Gary H. Weight, Esq. The Defendant appeared in person and by counsel, Marilyn Moody Brown, Esq. and Richard L. Peel, Esq. The parties presented a Stipulation to the Court. The Court proceeded to hear the matter on its merits and having heretofore entered its

Findings of Fact and Conclusions of Law, now enters the following:

DECREE OF DIVORCE

1. Plaintiff is awarded a Decree of Divorce from and against the Defendant, the same to become final and absolute upon signing by the Court and entry of the Clerk in the Registry of Actions.

2. Plaintiff is awarded the personal property she presently has in her possession.

3. Defendant is awarded the personal property he presently has in his possession.

4. Defendant is ordered to pay the debt owing to Zion's First National Bank, which was incurred in February of 1989. Each party is ordered to pay his or her own debts incurred prior to the marriage, July 1, 1988 (but for the remodeling costs), or after the separation date, December 1, 1990.

5. Defendant is ordered to pay Plaintiff within sixty (60) days from the date of this decree, Plaintiff's pre-marriage and post marriage remodeling expenditures, in the stipulated amount of $12,562.65.

6. Defendant is awarded all real property which he brought into the marriage, including his personal home located at 773

South 400 East, Orem, Utah, and all personal property not otherwise awarded to Plaintiff herein.

7. Plaintiff is ordered to immediately reconvey to Defendant by quit claim deed, title to Defendant's premarital home located at 773 South 400 East, Orem, Utah.

8. Plaintiff is awarded all right, title and interest she has in her retirement and savings.

9. Plaintiff's claim to alimony is denied.

10. Plaintiff is ordered to pay within sixty (60) days of the date of this Decree, Defendant's attorneys fees and costs incurred subsequent to August 12, 1992, in the amount of $2,360 to Richard Peel, Esq., and $2,289 to Marilyn Moody Brown, Esq. Defendant may at his option and by permission of his attorneys, deduct such attorneys fees and costs from the $12,562 he is ordered to pay Plaintiff.

Let a decree be entered accordingly.

DATED this 28 day of October, 1992.

BY THE COURT:

LYNN W. DAVIS
District Court Judge

STATE OF UTAH
UTAH COUNTY
DISTRICT COURT

APPROVED AS TO FORM:

Gary H. Weight

GARY WEIGHT

APPENDIX "C"
Memorandum Decision

IN THE FOURTH JUDICIAL DISTRICT COURT

IN AND FOR THE COUNTY OF UTAH, STATE OF UTAH

JANET R. COX,	:	DECISION
Plaintiff,	:	
v.	:	
	:	Case No. 904402060
K. NORMAN COX,	:	
Defendant.	:	Judge Lynn W. Davis

This matter came before the court for trial on August 31, 1992. The plaintiff appeared in person and by counsel, Gary H. Weight, Esq. The defendant appeared in person and by counsel, Marilyn Moody Brown, Esq., and Richard Peel, Esq. The parties presented a stipulation and made opening arguments. At issue was (1) the award of alimony, (2) the fair and equitable division of assets and (3) the award of attorney's fees. Evidence was taken and the matter was taken under advisement. The court received a supplemental memorandum from defendant and both parties submitted proposed findings of fact and conclusions of law. This court has fully considered the evidence, memoranda submitted by counsel and oral argument.

The court, being fully advised in the premises, now enters its:

RULING

I. ALIMONY

Plaintiff seeks alimony in this case. The court will consider three factors in determining an award of alimony: (1) the financial conditions and needs of the receiving spouse; (2) the ability of the receiving spouse to produce a sufficient income for him or herself; and (3) the ability of the responding spouse to provide support. Burt v. Burt, 799 P.2d 1166 (Ut.App. 1990).

A. Facts.

In this case, the defendant sold his business after the separation of the parties. He had some employment with Utah Valley Community College but has not been able to renew his contract. He presently receives temporary unemployment compensation of $554.00 per month and is seeking gainful employment. Those unemployment benefits commenced the second week of July and will continue for twenty-six weeks. His historical earnings prove to be $1,457.00 per month and his earnings at UVCC were $17.65 per hour for approximately 15 hours per week. In addition, he receives $500.00 per month from the sale of his business. He suffers from a physical disability, necessitating knee operations. He cannot afford the operation which, if performed, would lay him up for six months. He borrows between $500.00 to $600.00 per month from his children in order to meet his financial obligations.

Plaintiff, on the other hand, earns $1,850.00 gross income and receives $1,134.00 net

income after deductions for taxes and retirement and savings accounts. Even the plaintiff recognizes that the present circumstances of the parties do not seem to compel an award of alimony to the plaintiff. The defendant's ability to pay alimony is clearly lacking at the present time. His historical earnings are not relevant because of his sale of his business and because his physical disability now precludes him from seeking jobs in his area of training; autobody repair.

It is important to note that plaintiff has enrolled in an Executive Masters Program in Public Administration through Brigham Young University. That executive program is conducted at night and will not interfere with her employment status. Brigham Young University will pay plaintiff's full tuition, but not associated costs.

It is clear from the evidence that neither party now is able to meet respective financial obligations. The plaintiff, since separation, has purchased a condominium and encumbered herself with a mortgage. Defendant has sold off numerous personal items, a gun collection, snowmobiles, cars, etc in attempting to finance the marriage. He also assumed new loans during the marriage. Most marketable personal items have been sold.

B. Decision

Applying the factors in Burt v. Burt, it is clear that the financial conditions and needs of both parties are deplorable. The plaintiff has enrolled in a tuition-paid graduate program with the hopes of bettering her financial position. Defendant currently has no such opportunity. Defendant has no current employment and because of physical disabilities, no

reasonably foreseeable ability to obtain employment and to pay alimony. The marriage is of a very short duration and both parties suffered significant financial reversals during the marriage. Accordingly, no alimony award is merited.

II. PROPERTY DIVISION

A. Facts

The parties married on July 1, 1988, in South Jordan, Utah. At marriage, plaintiff was 47 years old and defendant was 56 years old. Their marriage was the third for the plaintiff and second for the defendant. There were no children as issue of the marriage.

The marriage is of short duration (29 months), including a 5 month trial separation. The financial declarations of both parties support the fact that this marriage was a financial disaster for both parties.

The parties stipulated to various facts which affect property settlement matters and the court adopts the following:

1. Remodeling costs. The amount spent on remodeling by plaintiff was a total of $18,062.65 (of this amount $9,005.55 was spent by plaintiff in remodeling prior to the marriage and prior to the execution of the antenuptial agreement). Plaintiff received $5,500 from defendant as reimbursement of the amounts expended by her. Plaintiff spent $12,562,65 for remodeling. Defendant spent approximately $11,931 on remodeling. Remodeling was completed in order to accommodate the combination of the two families.

2. Personal property. The personal property will be awarded to the parties as it

has been divided. Defendant will assume the debt to Zion's First National Bank which was incurred in February, 1989 by the parties and was used for the acquisition of the personal property. Each party will pay all other debts he or she incurred after the separation date of 12/1/90.

3. Expenditures prior to marriage and post separation. Expenditures made by either party prior to the marriage (but for the remodeling costs) or after the separation date (December 1, 1990), are not claimed, at issue, or reimbursable.

4. Value of separate property. The parties stipulate that the actual amounts that should have been inserted in the antenuptial agreement for Norman Cox should have been$368,000 and the amount that should have been inserted in the antenuptial agreement for Janet Cox was $74,000.

5. Net worth of parties at time of separation. (The court chooses to accept the appraisal of Timothy Campbell). Plaintiff's net worth at time of separation was $10,539. Defendant's net worth at time of separation was $232,249. The plaintiff's net decrease was $63,461. The defendant's net decrease is $135,709.

6. Amount of cash given by defendant to plaintiff. The amount of cash paid to the plaintiff during the marital period by the defendant was $10,725 (inclusive of reimbursement of remodeling costs).

7. Expenditures by the parties. Plaintiff's expenditures during the marriage was $74,000. Additionally, plaintiff gave to her children $24,000. The total amount that

plaintiff paid to her children by check (some of which is included above) is $31,284.15. Defendant's expenditures during the marriage were $109,114.45.

8. Current income. Plaintiff's current gross income is $1,850.00 per month. Defendant's current unemployment compensation is $554.00 per month. The defendant's historical income is $1457.00 per month.

9. Cabin and retirement benefits. The plaintiff waives her claim for an interest in defendant's cabin. The defendant waives his claim for an interest in plaintiff's retirement or any other property belonging to plaintiff. The plaintiff waives any interest in defendant's business or proceeds from the sale of business or any other property belonging to defendant.

Prior to marriage, the parties executed an antenuptial agreement and the defendant intended for his premarital assets, including his personal home, to be protected under the provisions of the antenuptial agreement. The plaintiff had knowledge of defendant's intent to protect his personal home. The agreement was executed on June 30, 1988, two days prior to the marriage. Nearly contemporaneous with the signing of the prenuptial agreement, (June 29, 1988), defendant executed a warranty deed granting plaintiff a joint interest in his premarital home.

The protection provision of the antenuptial agreement is patently incompatible with the provisions of the deed. Plaintiff's attorney in 1988, Doug Nielsen, advised and counseled the parties regarding the execution of the antenuptial agreement and warranty deed. Mr. Nielsen drafted the antenuptial agreement and the warranty deed. Defendant's

attorney, Phil Ivie, was not present at any of the meetings held between the parties and Mr. Nielsen. Mr. Nielsen did not send the warranty deed to Mr. Ivie for his review, nor did Mr. Nielsen speak with Mr. Ivie at any time regarding the warranty deed. It is unclear from the disparate testimony of the witnesses whether defendant was confused, or whether he truly intended to grant a joint interest to the plaintiff, irrespective of the mutually acknowledged protection provision of the antenuptial agreement.

The defendant built the subject house in 1966, raised nine children there, and paid off his twenty year VA mortgage sometime in 1987. At the time of the marriage of the parties in 1988, the property was unencumbered by mortgage or lien.

The value of the residence at separation was disputed, and the court accepts the more professional appraisal of Mr. Timothy Campbell which established the value at $105,000.00. There is no dispute that the value of the subject premises at the time of the marriage was $77,000.00.

Just prior to the marriage, plaintiff sold her separate residence. There is evidence that plaintiff's brother, an accountant, and the defendant both advised her to keep the home. From the proceeds of that sale, plaintiff paid her parents $18,000.00. They, evidently had loaned her money to purchase the premises. While it is true that plaintiff liquidated her home in anticipation of the marriage, it is also true that she had little equity in that home. At closing she received $21,000.00, $18,000.00 of which was immediately paid to her parents. It appears that plaintiff's net worth at the time she executed the prenuptial

agreement, $74,000, included the $18,000.00 which she repaid to her parents. Plaintiff expended approximately $74,000.00 during the marriage. She liquidated some assets and approximately $30,000.00 was given directly to her children during the marriage. In light of the above, plaintiff's argument of detrimental reliance appears to lack foundation.

B. DISCUSSION

The stipulation resolves all property disputes except for a consideration of the division of defendant's premarital home. The prenuptial agreement protects defendant's interest and the warranty deed purports to convey a one half interest to plaintiff. Article I of the antenuptial agreement provides that each party's separate property and the proceeds thereof would remain separate.

Plaintiff argues that she is entitled to a one half interest in the defendant's premarital home. Defendant argues that plaintiff is only entitled to reimbursement for her pre and post marriage remodeling cost, and any accrued valued. This court is more persuaded by defendant's argument. The court adopts the following reasoning of defendant.

Utah court have held that disposition of property under an antenuptial agreement is valid as long as there is no fraud, coercion or material nondisclosure. D'Aston v. D'Aston, 808 P.2d 111 (Ut.App. 1990); Berman v. Berman, 749 P.2d 1271 (Ut.App. 1988). The antenuptial agreement the plaintiff executed on June 28, 1988, was validly executed and was not subject to fraud, coercion or material nondisclosure. The parties entered into the agreement upon plaintiff's request, her attorney drafted the agreement, the parties were

competent, the agreement was duly signed and notarized, and as consideration therefore both parties, separate property was protected. Additionally, plaintiff's own attorney signed the agreement and certified that he consulted with plaintiff and advised her of her property rights and the legal significance of the antenuptial agreement.

The Utah Court of Appeals held that under the terms of an antenuptial agreement where each party has relinquished all rights to previously acquired property of the other party, he or she has no right to the other party's separate property nor any increase in value that might accrue to that property. Rudman v. Rudman, 812 P.2d 73, 78 (Ut.App. 1991); Berman, 749 P.2d at 1271.[1]

To date, Utah courts have not directly addressed the question of whether a warranty deed with rights of survivorship executed subsequent to an antenuptial agreement abrogates the terms and provisions of the antenuptial agreement. However, other jurisdictions have

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[1]The Rudman court held that ,under the parties antenuptial agreement, the husband's premarital property together with any increase would remain the property of the husband, in spite of the fact that the wife contributed labor and/or assets to the property during marriage. Rudman, 812 P.2d at 78. In Berman, the court overturned the lower court's order awarding the wife one-half the equity in the husband's separate property home purchased prior to marriage. The Berman court held that the antenuptial agreement preserved the husband's house as his separate property. The court based its reversal on evidence presented at trial wherein the wife knowingly and voluntarily entered the antenuptial agreement, no fraud or undue influence induced the wife to sign the agreement and the agreement stated that real property owned by the parties at the time of marriage was to remain the separate property of each spouse. Berman, 749 P.2d at 1271.

confronted this very issue. In Peet v. Monger, 56 N.W.2d 589 (Iowa 1953), the parties entered into an antenuptial agreement prior to their marriage. Subsequent to the parties' execution of the antenuptial agreement, the wife executed a joint tenancy deed which contained no language expressly affecting the cancellation of the antenuptial agreement. The Iowa Supreme Court upheld the lower court's decision by finding that, under the antenuptial agreement, the husband had no interest in or control over the joint tenancy property unless he survived the wife. See also In Re Marriage of Van Brocklin, 468 N.W.2d 40 (Iowa App. 1991).

In the case at hand, the warranty deed with rights of survivorship is void of language expressly canceling the antenuptial agreement. In fact, the deed expressly states that the deed is subject to all "existing covenants of whatever nature." Additionally, the antenuptial agreement existed at the time the warranty deed was executed and plaintiff had knowledge that the antenuptial agreement she executed on june 28, 1988 attempted to control and preserve the same property covered by the warranty deed.

Plaintiff next argues that the antenuptial agreement was abrogated when the parties liquidated and expended their separate property in support of the marriage. This argument is baseless. Recital "E" of the antenuptial agreement expressly provides:

> Each of the parties mutually desires to retain, manage or dispose separately by gift, will or otherwise all of his or her estate to the same extent as if each of such parties remained single.

Clearly, by executing the antenuptial agreement, the parties contractually retained the right to

dispose of their separate property by commingling such assets or otherwise.[2]

Accordingly, the antenuptial agreement was not abrogated as to defendant's separate property which was not commingled or liquidated, and these assets are still protected under the provisions of the antenuptial agreement.

The Utah Supreme Court has held on several occasions that a trial court is not bound by the state of title to real property prior to the issuance of a divorce decree. Georgedes v. Georgedes, 627 P.2d 44, 45 (Utah 1981); Jackson v. Jackson, 617 P.2d 338, 340-41 (Utah 1980); Jesperson v. Jesperson, 610 P.2d 326, 328 (Utah 1980); Lundgreen v. Lundgreen, 184 P.2d 670 (Utah 1947). A trial court is empowered to make distributions as are just and equitable and may compel such conveyances as are necessary to that end. Jackson, 617 P.2d at 341.

In upholding the lower court's decision in Georgedes, 627 P.2d at 45, the Utah Supreme Court held that it was equitable to return to the husband a home and business which he had brought into the marriage, notwithstanding that title had been placed in joint tenancy. According to the Georgedes court, the trial court's decree simply put the parties to a second

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[2]In Burt v. Burt, 799 P.2d 1166 (Ut.App. 1990), the utah Court of Appeals held that separate property loses its separate character when the marital parties have inextricably commingled the separate property with marital property or when they have contributed all or part of the separate property to the marital estate. See also Rudman, 812 P.2d at 78. The analysis of both the Rudman and the Burt courts clearly indicates that separate property may be transmuted by the parties into marital property if such property cannot be traced to a separate property source.

marriage of relatively short real duration back into sole ownership of the properties they brought into the marriage. Id. at 45.

In upholding the lower court's decision in Jesperson, 610 P.2d at 328, the Utah Supreme Court held that where the wife had used her separate property to purchase a mobile home during marriage and even though the mobile home was held in joint tenancy and substantially improved by the husband's labors, it was equitable for the lower court to award her an amount equal to the value of the assets she brought into the marriage.

And, in a case which is factually similar to the case at hand, the Utah Supreme Court in Lundgreen, held that a wife was only entitled to receive one-half the market value in excess of the original purchase price of a home purchased during marriage with the husband's separate assets, even though the home was held in joint tenancy and the wife had contributed extensive labor and separate funds in remodeling the home. 184 P.2d at 672.[3]

In arguing that she is entitled to one-half the value of defendant's separate property home, plaintiff relies on Hogue v. Hogue 831 P.2d 121 (Ut.App. 1992). In Hogue, the sole issue before the Utah Court of Appeals was whether a grantor spouse who conveyed his

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[3]A common factual theme exists in the Georgedes, Jesperson and Lundgreen cases and the case at hand. In each situation, the parties were married for less than seven years, no children were born into the marriage, both parties had been married before, one of the parties either brought a premarital home into the marriage or the home was purchased with that party's separate funds, title to the home was placed in joint tenancy within the first year of marriage, and the other party allegedly contributed labor, income and/or assets to remodel or improve the realty.

entire interest in his separately owned real property, was entitled to a one-half interest in the property upon the parties divorce. Plaintiff's reliance upon Hogue is misplaced.

The Hogue case is factually distinguishable from the facts of the Georgedes, Jesperson and Lundgreen cases and the case at hand. In Hogue, the parties had been married for an unspecified period of time, were divorced, then remarried. Subsequent to their remarriage, In fact, Mr. Hogue transferred his entire interest in real property to his wife, as a means of protecting the property from his judgment creditors. Unlike the case at hand, there was no prenuptial agreement. The parties contracted for the purchase of additional acreage adjoining the real property. The parties cohabitated together on the property prior to being remarried, and the parties' second marriage lasted for over seven years. Lastly, the facts do not indicate whether Mr. Hogue had asked the trial court for anything more than a one-half interest in the property.

Utah courts have held that upon divorce, each party should retain the separate property he or she brought into the marriage. Dunn v. Dunn, 802).2d 1314 (Ut.App. 1990). In making a property division, a trial court should take into consideration all the pertinent circumstances of the parties' marriage. Woodward v. Woodward, 656 P.2d 431, 432 (Utah 1982); Jackson, 617 P.2d at 338; English v. English, 565 P.2d 409 (Utah 1977).

The pertinent circumstances this court must consider are: (1) the duration of the marriage; (2) the parties' ages at time of marriage and whether any children were born into the marriage; (3) the amount and kind of property to be divided, whether the property was

acquired before or during the marriage, and the source of the property; (4) the parties' standard of living, respective financial conditions, needs and earning capacity; and (5) the health of the parties. Hogue, 831 P.2d 120 (Ut.App. 1992).

The court notes the following facts. First, the parties were married for fewer than three years. From the day they were married, July 1, 1988, to the date of their final separation, December 1, 1990, the parties were only married for twenty-nine months. Additionally, during this twenty-nine month period the parties experienced a brief trial separation of five months.

Second, plaintiff was 47 years old and defendant was 56 upon their marriage. The marriage was plaintiff's third marriage and was defendant's second marriage. No children were born into the marriage.

Third, the amount which plaintiff is seeking to obtain, $52,500 (one-half the value of her 1990 appraisal on the home), substantially exceeds the monies she paid toward the remodeling of the home, $12,500. This court takes into consideration the fact that defendant has owned the property in question since 1966, and that at the time of marriage, the home was free and clear of all encumbrances and liens.

The home has special meaning to defendant since he has raised all nine of his children in the home. If this court were to award plaintiff one-half the value of the home, defendant would be forced to sell the home to reimburse plaintiff since he is unemployed.

Fourth, defendant is not in the same financial situation as he was prior to marriage.

Due to a slowdown in his business and because of his deteriorating health, defendant was forced to sell his business. Defendant is currently unemployed and is looking for work. On the other hand, Plaintiff has been employed at all times relevant hereto at Brigham Young University. Due to her younger age and higher salary, plaintiff has an opportunity to recoup some of her losses while defendant's age and health may prevent him from securing steady full-time employment. Plaintiff's wages have steadily increased during the marriage with reasonable expectation that they will continue to do so.

Fifth, both parties liquidated substantial sums of their separate property assets and incurred substantial debts and obligations during the marriage. While plaintiff may have spent considerable sums during the marital period and incurred substantial debts an obligations, not all her expenditures or debts went to the marital estate. In 1989, plaintiff sold her major asset, the Monroe property. She immediately dispersed $24,000 to her children. This dispersement constituted the most significant reduction of her net worth during the marriage.

It appears that the deed was also drafted and executed with some haste. The parties were to married only three days after defendant executed the deed. The question that comes to mind is why would the parties execute two completely conflicting documents unless one was not anticipated or planned for by the parties? The antenuptial agreement was clearly intended by the parties to protect their separate property. That is precisely why they sought the services of an attorney. On the other hand, the warranty deed divested defendant of

fifty-percent of his ownership interest in his home. Clearly, the warranty deed was an afterthought by the parties.

From the testimony of Mr. Nielson, counsel for plaintiff, it is not clear that he sent a copy of the subject deed to Ray Ivie, counsel for defendant, for his review. This fact seems to be substantiated by dates and notary acknowledgements of defendant's signature on the warranty deed and the antenuptial agreement. Defendant's June 29, 1988, signature on both the warranty deed and affidavit of surviving joint tenant was acknowledged by Mr. Nielson's notary, Cynthia Shumway, while defendant's June 30, 1988 signature on the antenuptial agreement was acknowledge by Ivie & Young's notary, Lois Pinster. If the deed had been sent over to Ivie & Young for their review, prior to the deed's execution, defendant's signature would have been most likely notarized by Ivie & Young's notary as well.

Under the rationale of the Utah Supreme Court in Georgedes, Jesperson and Lundgreen where one of the parties contributes separate property assets to remodel or improve a home brought into the marriage by the other spouse, and title to the home is placed in joint tenancy within the first year of marriage, it is equitable to return to the spouse who contributed their separate property assets to remodel or improve the premarital house that spouses actual remodeling expenditures plus one-half of the increase in value to the property is such increase exists.

In the case at hand, the parties have stipulated that the value of defendant's premarital home in 1988, prior to the marriage and any improvements was $77,0000. The court has

found that the home's value was $105,000.00 upon the parties separation on December 1, 1990. The parties stipulated that plaintiff contributed $12,562. 65 toward the remodeling of defendant's home and that defendant expended $11,931.00 on the remodeling. In addition, defendant reimbursed plaintiff $5,550.00 for remodeling costs.

Based on the foregoing, even though the court has determined that the value of Defendant's premarital home upon the parties final separation was $105,000.00, this court finds that the home did not increase in value since the value of defendant's premarital home in 1988 plus the amount of monies the parties paid toward the remodeling or $106,993.65, exceeds the $105,000 appraised value of the home.[4]

C. DECISION ON DIVISION OF PROPERTY

Plaintiff is not entitled to one-half of defendant's interest in the home and plaintiff has no life estate. Taking into consideration all of the pertinent circumstances, it is just and equitable that plaintiff convey title to the subject property to defendant.

Plaintiff is entitled to be compensated for her actual pre-marriage and post marriage expenditures for remodeling in the stipulated amount of $12,562.65. The balance of the

---

[4]

	$77,000	[value of home in 1988]
+	$12,562.65	[value of plaintiff's remodeling expenditures]
+	$5,500	[amount defendant reimbursed plaintiff for remodeling]
+	$11,931	[value of defendant's remodeling expenditures]
=	$106,993.65	

issues respecting personal property division and financial obligations are resolved by the stipulation and appear just and equitable.

III. ATTORNEY'S FEES

Pursuant to Rule 68 of the Utah Rules of Civil Procedure, the defendant proffered an offer of judgment to plaintiff of $24,000.00 on or about August 12, 1992. Since plaintiff's judgment is not more favorable than defendant's $24,000.00 offer, plaintiff must pay defendant's costs incurred after the making of the offer. Marilyn Moody Brown, Esq. and Richard L. Peel, Esq., counsel for defendant, have submitted affidavits in support of attorney's fees generated since August 12, 1992. The court finds the amount set forth to be fair and reasonable under the circumstances; $2,360.00 for the legal services of Mr. Peel and $2,289 for legal services rendered by Ms. Brown. Plaintiff is obligated to pay $4,649.00.

The court finds that both the plaintiff and defendant are in need of financial assistance and, thereby, orders that each pay respective attorney's fees except as set forth above.

Plaintiff is awarded a Decree of Divorce from and against the defendant, the same to become final and absolute upon signing by the court and entry by the clerk in the Registry of Actions. Plaintiff is also entitled to the restoration of her maiden name.

Counsel have submitted proposed Findings of Fact, Conclusions of Law and Decree in connection with this case. Upon review, defendant's proposal most closely reflects the ruling of the court except for the attorney's fee issue.

The court directs counsel for the defendant to prepare findings of fact, conclusions of

law and decree of divorce consistent with the foregoing decision of the Court and the stipulation of the parties received at trial.

DATED AT PROVO, UTAH, this 25 day of September, 1992.

BY THE COURT

Judge Lynn W. Davis

IN THE FOURTH JUDICIAL DISTRICT COURT
IN AND FOR THE COUNTY OF UTAH, STATE OF UTAH

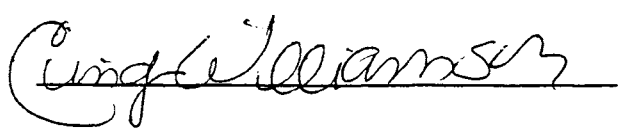
JANET R. COX,	:	CERTIFICATE OF MAILING
Plaintiff,	:	
v.	:	
	:	Case No. 904402060
K. NORMAN COX,	:	
Defendant.	:	Judge Lynn W. Davis

I hereby certify that I caused to mailed, postage prepaid, a true and correct copy of the court's Decision on September 28, 1992, to the following:

Gary Weight, Esq.
Attorney for Plaintiff
ALDRIDGE, NELSON, WIEGHT & ESPLIN
P.O. Box L
Provo, UT 84603

Marilyn Moody Brown, Esq.
Attorney for Defendant
ROBINSON, SEILER, GLAZIER & BROWN
80 North 100 East
P.O. Box 1266
Provo, UT 1266

Richard L. Peel, Esq.
Attorney for Defendant
228 S. Fourth Street
Las Vegas, NV 89101



APPENDIX "D"
Notice of Appeal

MARY C. CORPORON #734
Attorney for Plaintiff
CORPORON & WILLIAMS, P.C.
310 South Main Street
Suite 1400
Salt Lake City, Utah 84101
(801) 328-1162

IN THE FOURTH JUDICIAL DISTRICT COURT,

IN AND FOR UTAH COUNTY, STATE OF UTAH.

JANET R. COX,

Plaintiff,

-vs-

K. NORMAN COX,

Defendant.

NOTICE OF APPEAL

Civil No. 904402060

Judge Lynn W. Davis

PLAINTIFF TO THE ABOVE-ENTITLED ACTION, by and through her counsel of record, Mary C. Corporon, hereby appeals from the final Judgment Decree of Divorce in the above-entitled action; entered on or about October 28, 1992.

DATED THIS 25 day of November, 1992.

CORPORON & WILLIAMS

MARY C. CORPORON
Attorney for Plaintiff

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I am employed in the offices of Corporon & Williams, attorneys for the plaintiff herein, and that I caused the foregoing NOTICE OF APPEAL to be served upon defendant by placing a true and correct copy of the same in an envelope addressed to:

MARILYN MOODY BROWN
Attorney for Defendant
80 North 100 East
Provo, Utah 84606

RICHARD PEEL
Attorney for Defendant
228 South Fourth Street
Las Vegas, Nevada 89101

and depositing the same, sealed, with first-class postage pre-paid thereon, in the United States mail at Salt Lake City, Utah on the 25 day of Novembe, 1992.

Secretary

APPENDIX "E"
Antenuptial Property Agreement

COF 1

ANTENUPTIAL PROPERTY AGREEMENT

Antenuptial Agreement made this 30th day of June, 1988, between KENNETH NORMAN COX, an adult, hereinafter referred to as prospective husband, and JANET J. REX, an adult, hereinafter referred to as prospective wife, in consideration of the contemplated marriage of the above-named parties.

RECITALS

A. A marriage is intended and desired to be solemnized between the parties hereto.

B. Each of the parties is possessed of property which they separately own or have an interest in their own individual right.

C. Each of the parties has made a full disclosure to the other party of all of his or her property and assets and of the value thereof, and this Agreement is entered into with a full knowledge on the part of each as to the extent and probable value of the estate of the other, and of all the rights conferred by law on each in the estate of the other by virtue of such proposed marriage.

D. In anticipation of such marriage the parties desire to fix and determine the rights of each of them in any and all property of every nature and description and wheresoever located that the other of them may own or have an interest in at the time of such marriage or may acquire thereafter.

E. Each of the parties mutually desires to retain, manage or dispose separately by gift, will or otherwise all of his or her estate to the same extent as if each of such parties remained single.

In consideration of the mutual covenants contained herein, the parties agree as follows:

ARTICLE I

Each of the parties hereto shall retain the title, management and control of the estates now owned by each of them, whether real, personal or mixed, and all increase or addition thereto, entirely free and unmolested by the other party and may encumber, sell, dispose, give or provide by will for the disposition of any or all of such estates so separately owned and possessed. At the death of either no claim by inheritance, descent, surviving spouse award, homestead, dower or maintenance

shall be made by either of the parties hereto against the other or against the estate of the other.

ARTICLE II

Each of the parties hereto separately waives any and all rights by dower, homestead, surviving spouse award, inheritance, descent or any other marital right arising by virtue of statute or otherwise in and to any parcel of the estate now owned and possessed by the other, and does hereby agree and consent that each shall have full power and control in all respects to exercise free and undisputed ownership, management and disposition of each of such estates and increases thereto now owned and possessed by the parties, and each of such parties does waive and renounce any legal and statutory rights that might, under any law, be set up against any part of the estate of the other and does consent that the estate of each shall descend or be disposed of by will or otherwise to the heirs or legatees or devisees of each of the parties, free and clear of any claim by inheritance, dower, surviving spouse award or homestead or maintenance or any claim otherwise given bylaw to a husband and wife.

ARTICLE III

This Agreement shall not in any manner, bar or affect, the right of either party to claim and receive any property of any nature or character that the other party hereto, by last will, or by any other instrument, may give, devise, bequeath, transfer or assign to the other party hereto.

ARTICLE IV

If either party shall mortgage, pledge, or sell and convey, his or her real or personal estate, whether in whole or in part, the other party hereto shall, upon demand, from time to time join in any and every mortgage, or deed of conveyance, or in any other instrument that may be necessary or desirable to make the same effectual.

ARTICLE V

In the event that at any time during the existence of the marital relationship between the parties, they should be or become residents of a state under the laws of which husband and wife acquire property interests commonly known as community property or any other property and interests different from the property interests of husband and wife under the laws of the State of Utah, their property interests shall nevertheless remain

the same as they would have been under the terms of this agreement construed in accordance with the laws of the State of Utah, and the parties will each, at any time during or after the termination of the marital relationship, execute and deliver any and all deeds and other instruments desirable or necessary to transfer any right, title or interest, in any property or estate of the other which they may acquire by virtue of any so-called community property laws to the persons who would otherwise be entitled thereto by virtue of this Agreement.

ARTICLE VI

If the prospective husband shall survive the prospective wife, the prospective husband shall not, as surviving husband, make any claim to any part, or share, of the real and/or personal estate of which the prospective wife may die seized or possessed. The prospective husband, in consideration of such marriage, hereby expressly waives and relinquishes all right in and to the real property of which the prospective wife may die seized, as well as all right in and to the personal estate of the prospective wife, or a surviving husband, heir-at-law, or otherwise.

ARTICLE VII

If the prospective wife shall survive the prospective husband, she shall not, as surviving wife, make any claim to any part, or share, of the real and/or personal estate of which the prospective husband may die seized or possessed. The prospective wife hereby waives and relinquishes all claims to an allowance, homestead, widow's award, or any other right in and to the real and/or personal estate of which the prospective husband may die seized or possessed.

ARTICLE VIII

Neither party hereto, by virtue of such marriage, shall have, or acquire, any right, title or claim in and to the real or personal estate of the other, that the estate of each shall descend to or vest in his or her, heirs-at-law, legatees, or devisees, as may be prescribed by his or her last will and testament, or in default of such last will and testament, by the law then in force, as though no marriage had ever taken place between the parties.

ARTICLE IX

This Agreement is entered into by the parties hereto with full knowledge on the part of each of the extent and probable

value of all of the property or estate of the other, and of all rights that, but for this Agreement, would be conferred by law upon each of them in the property or estate of the other, by virtue of the consummation of the proposed marriage, and the rights of the respective parties hereto in and to each other's property, or estate, of whatsoever character the same may be, shall be determined, fixed and settled by this Agreement, and not otherwise. Prospective husband represents that, on the date of this Agreement, the approximate value of his property and assets is THREE HUNDRED EIGHTY THOUSAND AND NO/100 DOLLARS ($ 380,000.00). Prospective wife represents that, on the date of this Agreement, the approximate value of her property and assets is SEVENTY THOUSAND AND NO/100 DOLLARS ($ 70,000.00).

ARTICLE X

This Agreement constitutes the entire Agreement between the parties relating to their antenuptial property arrangements. There are no oral Agreements between the parties respecting such antenuptial property arrangements. Any alteration or modification of this Agreement must be in writing, signed and acknowledged by each of the parties hereto.

ARTICLE XI

This Agreement shall bind the parties hereto and their respective heirs, administrators and assigns, and shall become effective only upon the consummation of the proposed marriage between the parties hereto, and if such marriage does not take place, this Agreement shall be null and void.

ARTICLE XII

The parties hereto both stipulate that they, and each of them, were represented by legal counsel of their choice in the preparation of this Agreement; that they have read this Agreement and have had its contents explained, and to each of them, by such counsel; and that they fully understand the terms, provisions, and legal consequences of this Agreement.

IN WITNESS WHEREOF, the parties have executed this Agreement at Provo, Utah, the day and year first above written.

Kenneth Norman Cox

KENNETH NORMAN COX

JANET J. REX

STATE OF UTAH)
ss.
COUNTY OF UTAH)

On June 30, 1988, personally appeared before me KENNETH NORMAN COX, one of the signers of the foregoing instrument, who duly acknowledged to me that he executed the same.

NOTARY PUBLIC

My Commission Expires: 4-12-92
Residing At: Provo, Utah

STATE OF UTAH)
ss.
COUNTY OF UTAH)

On June 28, 1988, personally appeared before me JANET J. REX, one of the signers of the foregoing instrument, who duly acknowledged to me that she executed the same.

NOTARY PUBLIC

My Commission Expires: August 14, 1991
Residing At: Provo, Utah

CERTIFICATION OF ATTORNEY

I, _____ certify that I am a licensed attorney, admitted to practice law in the State of Utah; that I have consulted with KENNETH NORMAN COX, who is a party to the foregoing Agreement, and that I have fully advised him of his property rights and the legal significance of the foregoing Agreement; and that KENNETH NORMAN COX has acknowledged his full

and complete understanding of the legal consequences and of the terms and provisions of the foregoing Agreement and has freely and voluntarily executed the Agreement in my presence.

STATE OF UTAH)
:ss.
COUNTY OF UTAH)

On June 30, 1988, personally appeared before me Roy H. Ivie, Attorney at law, signer of the above instrument, who duly acknowledged to me that he executed the same.

Lois A. Pinster
NOTARY PUBLIC

LOIS A. PINSTER NOTARY PUBLIC STATE OF UTAH

My Commission Expires: 4-12-92
Residing At: Provo Utah

CERTIFICATION OF ATTORNEY

I, DOUGLAS A. NIELSON, certify that I am a licensed attorney, admitted to practice law in the State of Utah; that I have consulted with JANET J. REX, who is a party to the foregoing Agreement, and that I have fully advised her of her property rights and the legal significance of the foregoing Agreement; and that JANET J. REX has acknowledged her full and complete understanding of the legal consequences and of the terms and provisions of the foregoing Agreement and has freely and voluntarily executed the Agreement in my presence.

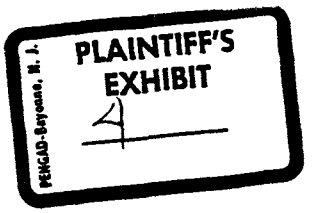
STATE OF UTAH)
:ss.
COUNTY OF UTAH)

On June 28, 1988, personally appeared before me DOUGLAS A. NIELSON, Attorney at law, signer of the above instrument, who duly acknowledged to me that he executed the same.

Cynthia Shumway
NOTARY PUBLIC

My Commission Expires: August 14, 1991
Residing At: Provo, Utah

APPENDIX "F"
Warranty Deed



ENT 18702 BK 2522 PG 794
NINA B REID UTAH COUNTY RECORDER DEP
1988 JUN 30 8:51 AM FEE 8.00
RECORDED FOR DOUGLAS A NIELSON

WARRANTY DEED

Def. Ex. #46

NORMAN COX, grantor, hereby CONVEYS and WARRANTS to NORMAN COX and JANET J. REX, as joint tenants with full rights of survivor- ship and not as tenants in common, grantees, of 773 South 400 East, Orem, Utah, for the sum of TEN DOLLARS ($10.00) and other valuable consideration, the following described real property situated in Utah County, State of Utah:

Commencing in the intersection of the East Boundary of 400 East Street, Orem, Utah, and the grantors South fence line extended, said point being 207.90 feet North and 43.40 feet East of the Center of Section 23, Township 6 South, Range 2 East, Salt Lake Base and Meridian; thence North along the East boundary of said Street 66.00 feet; thence South 88° 55' East along a fence line extended and a fence line 241.85 feet to the grantors East fence line; thence South 0° 44' West along said East fence line 65.50 feet to the said South fence line; thence North 89° 02' West along said fence line and fence line extended 241.00 feet to the point of beginning.

PHOTOCOPY RECORD

Together with all appurtenances thereunto belonging.

This deed is hereby made expressly subject to all existing and recorded restrictions, exceptions, reservations, easements, rights-of-way, conditions, liens, encumbrances, and covenants of whatever nature, if any, and is expressly subject to all municipal, city, county, and state zoning laws and other ordinances, regulations, and restrictions, including statutes and other laws of municipal, county, or other governmental authorities applicable to and enforceable against the premises described herein.

WITNESS the hands of said grantors this 27 day of June, 1988.

Norman Cox
NORMAN COX

STATE OF UTAH)
:ss.
COUNTY OF UTAH)

On June 29, 1988, personally appeared before

EXHIBIT A

me NORMAN COX, the signer of the within instrument, who duly acknowledged to me that he executed the same.

Cynthia Shumway
NOTARY PUBLIC

My Commission Expires: August 14, 1991
Residing At: Provo, Utah

WHEN RECORDED RETURN TO:
Douglas A. Nielson
3319 North University Avenue, Suite 200
Provo, Utah 84604

MAIL TAX NOTICE TO:
Grantees
773 South 400 East
Orem, Utah 84058

AFFIDAVIT OF SURVIVING JOINT TENANT

ENT 18701 BK 2522 PG 790
NINA B REID UTAH COUNTY RECORDER DEP MB
1988 JUN 30 8:48 AM FEE 10.00
RECORDED FOR DOUGLAS A NIELSON

STATE OF UTAH)
:ss.
COUNTY OF UTAH)

NORMAN COX, of legal age, being duly sworn, deposes and says:

That RUBY GURR DUKE COX, the decedent mentioned in the attached certified copy of Certificate of Death, is the same person as RUBY S. COX, named as one of the parties in that certain Quit-Claim Deed dated November 6, 1967, executed by MARY ANN DUKE, FENTON J. PRINCE and LILLIAN T. PRINCE, recorded as Entry No. 7627, in Book 1117, Page 78 of official records of Utah County, State of Utah, concerning the real property situated in the County of Utah, State of Utah and described as follows:

Commencing in the intersection of the East Boundary of 400 East Street, Orem, Utah, and the grantors South fence line extended, said point being 207.90 feet North and 43.40 feet East of the Center of Section 23, Township 6 South, Range 2 East, Salt Lake Base and Meridian; thence North along the East boundary of said Street 66.00 feet; thence South 88° 55' East along a fence line extended and a fence line 241.85 feet to the grantors East fence line; thence South 0° 44' West along said East fence line 65.50 feet to the said South fence line; thence North 89° 02' West along said fence line and fence line extended 241.00 feet to the point of beginning.

DATED this 29 day of June, 1988.

NORMAN COX
773 South 400 East
Orem, Utah 84058
Telephone: (801) 225-3781

STATE OF UTAH)
:ss.
COUNTY OF UTAH)

On the 29th day of June, 1988, personally appeared before me NORMAN COX, the signer of the within and foregoing instrument, who duly acknowledged to me that he executed the same.

Cynthia Shumway
Notary Public

My Commission Expires: August 14, 1991
Residing At: Provo, Utah